

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

PLANNED PARENTHOOD SOUTHEAST, INC.
on behalf of its patients, physicians, and staff;
REPRODUCTIVE HEALTH SERVICES, on
behalf of its patients, physicians, and staff; and
JUNE AYERS, RN,

Plaintiffs,

v.

ROBERT BENTLEY, in his official capacity as
Governor of the State of Alabama; LUTHER
STRANGE, in his official capacity as Attorney
General of the State of Alabama; ELLEN
BROOKS, in her official capacity as District
Attorney of Montgomery County, Alabama;
BRANDON K. FALLS, in his official capacity as
District Attorney of Jefferson County, Alabama;
ASHLEY RICH, in her official capacity as District
Attorney of Mobile County, Alabama; DONALD
E. WILLIAMSON, MD, in his official capacity as
State Health Officer of the State of Alabama;
GEORGE C. SMITH, JR., MD, in his official
capacity as Chairman of the Alabama Board of
Medical Examiners; JAMES E. WEST, MD, in his
official capacity as Chairman of the Medical
Licensure Commission of Alabama; and
MARTHA LAVENDER, DSN, RN, in her official
capacity as President of the Alabama Board of
Nursing,

Defendants.

CIVIL ACTION

Case No. _____

COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof allege the following:

PRELIMINARY STATEMENT

1. Plaintiffs, who operate the only licensed facilities in Montgomery, Birmingham, and Mobile where abortions are performed, bring this civil rights action, on behalf of themselves, their patients, physicians, and staff, under the U.S. Constitution and 42 U.S.C. § 1983, to challenge § 4(c) of Alabama House Bill 57, Reg. Sess. (2013) (“HB 57”).¹ That provision will unconstitutionally restrict the availability of abortion services in Alabama by imposing a medically unnecessary requirement that all physicians who perform abortions have staff privileges at a local hospital (“staff privileges requirement” or “requirement”). Plaintiffs and their physicians cannot comply with the staff privileges requirement, and, unless it is enjoined, will be unable to provide abortions after that requirement goes into effect on July 1, 2013.

2. By making Plaintiffs’ clinic licenses contingent on their physicians obtaining staff privileges at local hospitals, Alabama has unconstitutionally delegated standardless and unreviewable licensing authority to private parties – the hospitals – in violation of Plaintiffs’ due process rights under the Fourteenth Amendment. In violation of the rights of Plaintiffs’ patients, moreover, the requirement will shut down three-fifths of the abortion providers in the state, with no health benefit. The purpose and effect of the requirement, which is wholly unnecessary and unreasonable, is to impose a substantial obstacle in the path of women seeking abortion prior to viability, in violation of their constitutional right to privacy.

3. If Plaintiffs continue to provide abortions without complying with the staff privileges requirement, they would put their clinic licenses at risk, and if their physicians do so, they would jeopardize their medical licenses. In addition, any clinic administrator, such as

¹ A copy of the HB 57 is attached hereto as Exhibit A.

Plaintiff Ayers, who “knowingly and willfully permits the facility” to operate without complying with the staff privileges requirement is guilty of a Class C felony and subject to imprisonment.

4. The staff privileges requirement threatens irreparable injury to Plaintiffs, their physicians, staff, and their patients. Plaintiffs Reproductive Health Services and Ayers will be forced to close the clinic and Plaintiff Planned Parenthood Southeast, Inc. will be forced to cut staff, services, and hours. No remedy is available to them at law. The requirement, moreover, will threaten the health of Alabama women seeking abortions; and deprive women of their constitutionally protected right to obtain a pre-viability abortion.

5. Plaintiffs seek declaratory and injunctive relief from those constitutional deprivations.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over Plaintiffs’ federal claims under 28 U.S.C. § 1331 and 28 U.S.C. §§ 1343(a)(3)-(4).

7. Plaintiffs’ action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure.

8. Venue is proper pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this action occurred in this district and the majority of Defendants are located in this district.

PARTIES

A. Plaintiffs

9. Plaintiff Planned Parenthood Southeast, Inc. (“PPSE”) is a not-for-profit corporation, organized under the laws of Georgia. PPSE, which operates eight health centers in Alabama, Georgia, and Mississippi, provides comprehensive reproductive health care, including

family planning services, testing and treatment for sexually transmitted infections, cancer screening and treatment, pregnancy testing and all options counseling, and medication and surgical abortions. Through one of its corporate predecessors, PPSE has provided care in Alabama since 1930. PPSE operates two health centers in Alabama, one in Birmingham and one in Mobile, and is the only licensed abortion provider in those communities. In its Alabama health centers, PPSE provides medication abortion up to 9 weeks of pregnancy, as measured from the woman's last menstrual period ("LMP") and surgical abortion through 14 weeks LMP. PPSE sues on its own behalf and on behalf of its patients, physicians, and staff.

10. Plaintiff Reproductive Health Services ("RHS") is a licensed abortion facility, located in Montgomery, Alabama, that has provided safe and legal abortion services to women from Alabama and neighboring states for more than 35 years. RHS provides a range of high-quality reproductive health care services, including routine pap smears and well-woman exams; testing for sexually transmitted infections; contraceptive counseling and care, including Depo Provera shots; pregnancy testing and all options counseling; abortion services; and referrals for pre-natal care and/or adoption services. RHS is the only licensed abortion facility in Montgomery. RHS sues on its own behalf and on behalf of its patients, physicians, and staff.

11. Plaintiff June Ayers has been the owner and Administrator of Plaintiff RHS for the past 30 years.

B. Defendants

12. Defendant Robert Bentley is the Governor of Alabama, located at 600 Dexter Avenue, Montgomery, Alabama. The "supreme executive power" of the state is vested in the Governor, Ala. Const. Art. V, § 113, and he "shall take care that the laws be faithfully executed,"

Ala. Const. Art. V, § 120. As such, Defendant Bentley is responsible for enforcement of the staff privileges requirement. Defendant Bentley is sued in his official capacity.

13. Defendant Luther Strange is the Attorney General of Alabama, located at 501 Washington Avenue, Montgomery, Alabama. The Attorney General may – at “any time he or she deems proper” – “superintend and direct the prosecution of any criminal case in any of the courts of this state,” Ala. Code § 36-15-14, and may also “direct any district attorney to aid and assist in the investigation or prosecution of any case in which the state is interested,” Ala. Code § 36-15-15. As such, Defendant Strange is responsible for enforcement of the staff privileges requirement. Defendant Strange is sued in his official capacity.

14. Defendant Ellen Brooks is the District Attorney for Montgomery County, located at 251 South Lawrence Street, Montgomery, Alabama. District Attorneys have the power to “draw up all indictments and to prosecute all indictable offenses” within their territory. Ala. Code § 12-17-184(2). As such, Defendant Brooks is responsible for criminal enforcement of the staff privileges requirement. Defendant Brooks is sued in her official capacity.

15. Defendant Brandon K. Falls is the District Attorney for Jefferson County, located at 801 Richard Arrington Jr. Blvd. North, Mel Bailey Criminal Justice Center, Birmingham, Alabama. District Attorneys have the power to “draw up all indictments and to prosecute all indictable offenses” within their territory. Ala. Code § 12-17-184(2). As such, Defendant Falls is responsible for criminal enforcement of the staff privileges requirement. Defendant Falls is sued in his official capacity.

16. Defendant Ashley Rich is the District Attorney for Mobile County, located at 205 Government Street, Mobile, Alabama. District Attorneys have the power to “draw up all indictments and to prosecute all indictable offenses” within their territory. Ala. Code § 12-17-

184(2). As such, Defendant Rich is responsible for criminal enforcement of the staff privileges requirement. Defendant Rich is sued in her official capacity.

17. Defendant Donald E. Williamson, MD, is the State Health Officer at the Alabama State Department of Public Health, located at 201 Monroe Street, Montgomery, Alabama. Among other things, he is responsible for supervising and directing all activities of the State Department of Public Health, pursuant to Ala. Code § 22-2-2 *et seq.*, including the licensing, inspecting, and disciplining of abortion or reproductive health care centers, *see* Ala. Code § 22-21-20 *et seq.*; Ala. Admin. Code § 420-5-1-.01 *et seq.* As such, Defendant Williamson is responsible for enforcing the staff privileges requirement with respect to abortion clinic licensing. Defendant Williamson is sued in his official capacity.

18. Defendant George C. Smith, Jr., MD, is Chairman of the Alabama Board of Medical Examiners, located at 848 Washington Avenue, Montgomery, Alabama. The Board of Medical Examiners is responsible for licensing and disciplining physicians and physician assistants in Alabama. *See* Ala. Code § 34-24-53; Ala. Admin. Code r. 540-X-1-.07. As such, Defendant Smith is responsible for enforcing the staff privileges requirement with respect to physician and physician assistant licensing. Defendant Smith is sued in his official capacity.

19. Defendant James E. West, MD, is Chairman of the Medical Licensure Commission of Alabama, located at 848 Washington Avenue, Montgomery, Alabama. The Medical Licensure Commission is empowered to “issue, revoke, suspend and reinstate all licenses” authorizing physicians to practice, and is responsible for licensing and disciplining physicians in Alabama. Ala. Admin. Code r. 545-X-1-.06. As such, Defendant West is responsible for enforcing the staff privileges requirement with respect to physician licenses. Defendant West is sued in his official capacity.

20. Defendant Martha Lavender, DSN, RN, is President of the Alabama Board of Nursing, located at 770 Washington Avenue, Montgomery, Alabama. The Board of Nursing is responsible for licensing and disciplining nurses in the state of Alabama. Ala. Code § 34-21-25; *see also* Ala. Admin. Code r. 610-X-8-.01 *et seq.* As such, Defendant Lavender is responsible for enforcing the staff privileges requirement with respect to nurse licensing. Defendant Lavender is sued in her official capacity.

FACTUAL ALLEGATIONS

A. Abortion in Alabama

21. Legal abortion is one of the safest procedures in contemporary medical practice. The risk of abortion complications is minimal: nationwide, less than 0.3% of abortion patients experience a complication that requires hospitalization. Plaintiffs' hospitalization rates are even lower.

22. Plaintiffs operate three of the five licensed abortion clinics in the state. (The only other licensed abortion clinics in the state are located in Tuscaloosa and Huntsville.)

23. Women seek abortions for a variety of reasons, including familial, medical, financial, and personal reasons. Approximately one in three women in this country will have an abortion by age 45. Most women having abortions (61%) already have at least one child, and 66% plan to have children when they are older, financially able to provide necessities for them, and/or in a supportive relationship with a partner so their children will have two parents.

24. Plaintiffs' health centers are licensed as "abortion or reproductive health centers" by the Alabama Department of Public Health ("DPH"), and even before the events giving rise to this lawsuit, were subject to and in compliance with extensive regulations, including but not limited to those relating to patient care, infection control, personnel, physician qualifications, fire

evacuation plans, emergency communications, recordkeeping, and physical plant requirements (such as minimum doorway sizes and room sizes, interior finishes and flooring material, and emergency exits). *See* Ala. Admin. Code r. 420-5-1-.01 *et seq.* DPH conducts extensive annual surveys of Plaintiffs' health centers to ensure compliance with the regulations.

25. As required by those regulations, Plaintiffs also maintain contracts with outside covering physicians with "staff privileges at a hospital within the same standard metropolitan statistical area [as the clinic] that permit him or her to perform dilation and curettage, laparotomy procedures, hysterectomy, and any other procedures necessary to treat abortion-related complications." Ala. Admin. Code r. 420-5-1-.03(6)(b)(4). The covering physicians, or a qualified substitute, must be available to provide care 24 hours a day, seven days a week. *Id.* r. 420-5-1-.03(6)(b).

26. Even though abortion is extremely safe, particularly at the gestational ages at which Plaintiffs provide abortions, Plaintiffs are prepared to provide high quality care in the rare event of complications. In fact, most complications related to abortion are safely and appropriately managed in the clinic setting.

27. In the exceedingly rare event that a patient needs to be transferred via ambulance from an abortion clinic to a hospital, the EMTs will take the patient to the closest hospital, at their discretion. To ensure continuity of care, Plaintiffs' physicians will communicate with their outside covering physician as well as with the emergency room physician treating the patient. The ER physician will involve Plaintiffs' covering physician or the on-call physicians at the hospital as is necessary and appropriate. This is consistent with the standard of care.

28. Complications from abortion are not only rare, but the few complications that do occur may not present until after a patient has left the clinic. Plaintiffs provide their patients

upon discharge with phone numbers to call if they experience complications or have concerns at any time, day or night, after they have left the clinic. In most cases, the patients' concerns or complications can be addressed over the phone, by a qualified health care professional, or through a return visit to the clinic. In the rare instances where additional or after hours care is required, Plaintiffs' staff will refer the patient to a local emergency room, as is also consistent with the standard of care.

29. Between 40-60% of Plaintiffs' patients (depending on the clinic) come from outside the clinic's local area. In the rare event of a complication that occurs after the patient has left the clinic, the patient will be referred, consistent with the standard of care, to a hospital in her area, rather than a hospital near the clinic, making whether the abortion provider has staff privileges at a hospital close to the clinic completely irrelevant.

30. There is an increasing divide between inpatient and outpatient medicine in contemporary practice, with inpatient care handled more and more often by physicians who regularly or even exclusively provide care in hospital settings. In the exceedingly rare event of an abortion complication that requires hospitalization, the physician who provides the abortion may not in fact be the appropriate physician to manage her care in the hospital.

31. Requiring abortion providers to have hospital staff privileges, therefore, does not increase patient safety and is medically unnecessary.

32. Medical evidence has shown that physicians with specialties other than obstetrics and gynecology, and in particular family medicine, can safely provide abortions.

B. The Staff Privileges Requirement and Its Impact

33. Despite the lack of medical necessity for an abortion provider to have staff privileges at a local hospital, on April 9, 2013, Defendant Bentley signed HB 57 into law.

Section 4(c) of HB 57 requires that every physician who provides abortion “shall have staff privileges at an acute care hospital within the same standard metropolitan statistical area as the facility is located that permit him or her to perform dilation and curettage, laparotomy procedures, hysterectomy, and any other procedures reasonably necessary to treat abortion-related complications.”

34. HB 57 specifically states that it will become effective on the “first day of the third month following its passage and approval by the Governor.” HB 57, § 20. Thus, the staff privileges requirement will become effective on July 1, 2013.

35. Violation of the staff privileges requirement carries significant criminal and civil penalties. Any clinic “administrator” who “knowingly and willfully permits the facility to be operated in a manner” that violates the requirement is guilty of a Class C felony, punishable by imprisonment of between 1 and 10 years. *Id.* § 12(c); Ala. Code. § 13A-5-6.

36. Violation of the requirement by Plaintiffs is “grounds for adverse licensure action, up to and including [clinic] license revocation,” HB 57 § 14(a), and violation of the requirement by any of their physicians, physician assistants, or nurses would subject those professionals to adverse consequences for their professional licenses. *Id.* § 14(b).

37. In addition, Plaintiffs could be subject to civil suits for damages for failure to comply with the requirement by “[a]ny person who can demonstrate personal injury, including physical injury, emotional distress, or mental anguish.” *Id.* § 13.

38. HB 57 was championed by anti-abortion politicians as a means to end abortion in Alabama.

39. Plaintiffs cannot comply with the staff privileges requirement. For a variety of reasons that differ depending on the hospital, they cannot obtain local privileges. Those reasons

include: the hospitals' religious opposition to abortion, and various hospital requirements unrelated to the ability of Plaintiffs' physicians to provide safe abortion including, but not limited to, minimum number of hospital admissions per year (which Plaintiffs' physicians cannot satisfy because the abortion complication rate is so low), requirements that all doctors with privileges reside close enough to the hospital to be available for call (which Plaintiffs cannot satisfy because none of their physicians live nearby, and no local physicians are willing to provide abortions), and requirements at university hospitals that physicians obtain a faculty appointment first.

40. Also, one of PPSE's physicians is a board-certified family practice physician. In addition to the reasons stated above, that physician cannot comply with HB 57 because it requires staff privileges to provide certain gynecological procedures that are not within a family practice physician's scope of practice.

41. If the staff privileges requirement takes effect, all three of Plaintiffs' health centers will stop providing abortions as of July 1, 2013. This will leave the Birmingham, Montgomery, and Mobile areas without a licensed abortion provider, and will leave only two remaining licensed abortion clinics in Alabama: one in Huntsville and one in Tuscaloosa.

42. If the staff privileges requirement takes effect, women in Montgomery, Birmingham, and all points south would be forced to travel at least 100 miles, and some more than 200 miles – and most women must make that trip two times (the first for counseling and then a second visit, at least 24 hours later, for the abortion) – to obtain an abortion in the state.

43. Alabama does not require other similarly situated health care providers to have staff privileges at a local hospital. The regulations that govern physicians who provide outpatient procedures in their offices, including those that use general anesthesia, do not require

them to have admitting privileges. Ala. Admin. Code r. 540-X-10-.01 *et seq.* Nor are ambulatory surgery centers, in which more complicated and riskier procedures are regularly performed, required to have them for their physicians. *Id.* r. 420-5-2-.01 *et seq.*

C. Irreparable Injury

44. Plaintiffs and their patients will suffer irreparable harm from the violation of their constitutional rights if the staff privileges requirement goes into effect. The staff privileges requirement will force both Plaintiffs to cease to provide abortion as of July 1, 2013.

45. RHS will be forced to close, causing Plaintiff Ayers to lose her business of more than thirty years. PPSE will be forced to cut back on staff and hours, and will be unable to provide a critical service, causing them to lose patients and patient trust. Plaintiffs have no adequate remedy at law.

46. The staff privileges requirement will jeopardize women's health, shutting down three-fifths of the clinics that provide abortions without medical justification, and severely limiting the availability of abortions in the state.

47. In some cases, women will be unable to obtain abortions altogether because of the loss of abortion services. For other women, the additional travel required to the remaining licensed providers in Tuscaloosa or Huntsville will increase the costs and delay the abortion. Although abortion is one of the safest surgical procedures, the risk of complications (as well as the cost of the procedure) increases as the pregnancy advances. Given that the majority of Plaintiffs' patients are low-income, the increased costs alone will make it impossible for some women to obtain an abortion.

48. The staff privileges requirement will, therefore, irreparably harm Plaintiffs' patients in two ways: threatening the health of women seeking abortions, and depriving women of their constitutionally protected right to obtain a pre-viability abortion.

CLAIMS FOR RELIEF

COUNT I **(Plaintiffs' Right to Due Process)**

49. The allegations of paragraphs 1 through 48 are incorporated as though fully set forth herein.

50. The staff privileges requirement of HB 57 violates the rights of Plaintiffs to due process under the Fourteenth Amendment to the U.S. Constitution. The staff privileges requirement makes Plaintiffs' clinic licenses contingent on their physicians' obtaining staff privileges at local hospitals, and thereby unconstitutionally delegates standardless and unreviewable licensing authority to private parties.

COUNT II **(Substantive Due Process – Patients' Right to Privacy)**

51. The allegations of paragraphs 1 through 48 are incorporated as though fully set forth herein.

52. The staff privileges requirement violates Plaintiffs' patients' right to liberty and privacy as guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution. It is an unreasonable health regulation, and it has the unlawful purpose and effect of imposing an undue burden on women's right to choose abortion.

COUNT III
(Substantive Due Process)

53. The allegations of paragraphs 1 through 48 are incorporated as though fully set forth herein.

54. The staff privileges requirement violates the due process rights of Plaintiffs, their physicians, staff members, and patients by requiring them to comply with the staff privileges requirement, which is not rationally related to any legitimate state interest.

COUNT IV
(Equal Protection)

55. The allegations of paragraphs 1 through 48 are incorporated as though fully set forth herein.

56. The staff privileges requirement violates equal protection by treating Plaintiffs differently from other similarly situated health care providers without a sufficient state interest.

WHEREFORE, Plaintiffs respectfully request that the Court:

1. declare Section 4(c) of HB 57, to be codified at Ala. Code § 26-23E-4(c), unconstitutional under the Fourteenth Amendment to the United States Constitution;
2. enjoin Defendants, their employees, agents, and successors in office from enforcing Ala. Code § 26-23E-4(c) without bond;
3. award Plaintiffs costs and attorneys' fees pursuant to 42 U.S.C. § 1988; and
4. grant Plaintiffs such other, further, and different relief as the Court may deem just and proper.

Date: June 11, 2013

Respectfully submitted,

M. Wayne Sabel
ASB-4249-L74M
Sabel & Sabel, PC
2800 Zelda Road, Suite 100-5
Montgomery, AL 36106
waynesabel@sabellaw.com
(334) 271-2770

Attorney for Plaintiffs

Randall C. Marshall
ASB-3023-A56M
ACLU Foundation of Alabama, Inc.
207 Montgomery Street, Suite 910
Montgomery, AL 36104
rmarshall@aclualabama.org
(334) 265-2754

Alexa Kolbi-Molinas*
New York State Bar No. 4477519
Andrew Beck*
New York State Bar No. 4740114
American Civil Liberties Foundation
125 Broad Street, 18th Floor
New York, NY 10004
akolbi-molinas@aclu.org
abeck@aclu.org
(212) 549-2633

*Attorneys for Plaintiffs Reproductive Health
Services and June Ayers*

Carrie Y. Flaxman*
District of Columbia Bar No. 458681
Planned Parenthood Federation of America
1110 Vermont Avenue, NW, Suite 300
Washington, DC 20005
carrie.flaxman@ppfa.org
(202) 973-4800

Roger Evans*
New York State Bar No. 1797075
Planned Parenthood Federation of America
434 W. 33rd Street
New York, NY 10001
roger.evans@ppfa.org
(212) 541-7800

*Attorneys for Plaintiff Planned Parenthood
Southeast, Inc.*

**motion for admission pro hac vice pending*